

Service Date: June 4, 1981

PROPOSED ORDER NO. 4792

DEPARTMENT OF PUBLIC SERVICE REGULATION  
MONTANA PUBLIC SERVICE COMMISSION

In the matter of the investigation of ) UTILITY DIVISION  
a \$1,000 Hook-up fee and main extension) DOCKET NO. 80 12.106  
policies of the City of Hardin ) ORDER NO. 4792

APPEARANCES

FOR THE CITY:

Clarence T. Belue, Esq., 201 W. Fourth Street, Hardin,  
Montana 59034

FOR THE PROTESTANTS:

John C Allen, Staff Attorney, Montana Consumer Counsel  
34 W. Sixth Avenue, Helena, Montana 59620

FOR THE COMMISSION:

Robert F.W. Smith, Staff Attorney' 1227 11th Avenue, Helena,  
Montana 59620

BEFORE:

THOMAS J. SCHNEIDER, Commissioner and Hearing Examiner

FINDINGS OF FACT

1. During the past year, the Montana Public Service Commission received inquiries and complaints from two suburban Hardin residents, Dennis Wacker and Tom Mill, concerning the \$1,000 hook-up fee and main extension policies of the City of Hardin. These complaints were assigned Docket No. 80.12.106, and for purposes of hearing they were consolidated with Docket No. 80.8.65, the City of Hardin's request for a water rate increase. The hearing was held January 28, 1981, commencing at 10:00 a.m. in the Community

Service Facility, 8th and Custer Streets, Hardin, Montana.

2. At the combined hearing several people testified on the hook-up charge/main extension issue. Bill Hemmings explained that at this time, due to the City's limited capacity, it is refusing to enlarge its service area. Also, the City is refusing to make any outside City hook-ups. The City will be willing to serve Mr. Wacker, who lives three-fourth (3/4) mile beyond the service area, when the water system capacity is enlarged.

3. Steve Kenney gave some history and reasoning behind the City's adoption of the \$1,000 fee. The fee was instituted several years ago (12 customers have paid it). The City reasoned that, "the system that exists has been paid for by prior users through various methods, such as bonding and special improvement districts. This fee then is for participation in a line and system in which the out-of-city user has never participated in any way." (City's response to data request #2).

4. Mr. Wacker testified, recounting his attempts to obtain water service. Mr. Wacker is willing to pay the \$1,000 fee and has offered to give the City the waterline, but the City keeps deferring his request.

Mr. Wacker testified that others outside the City received hook-ups although they were located farther from the main than he. Mr. Wacker felt that the moratorium had not been uniformly applied as others had been hooked-up since his application. Dr. D.L. Van Zant explained, however, that Mr. Wacker's application was not acted on until the City had declared a moratorium on new hook-ups. The City presented a late-filed exhibit which listed all applicants for service, their dates of application, and how their applications were

treated. This exhibit tends to corroborate the City's contention that there were no approvals for out-of-city applicants for water service after the moratorium. However, the exhibit also shows that Mr. Wacker applied on August 4, 1981, approximately two weeks before the moratorium was established. Dr. Van Zant also pointed out that since the City declared the moratorium, it has annexed areas and added them to its water system. He stated that the City should not annex if it does not have the water.

5. Mr. Mill also testified, mainly speaking to the revenues and needed repairs for the system. Mr. Mill presented what he said were conflicting reports of the Farm Home Administration and the Montana Coal Board, but he basically supported the need of the City to upgrade the water system.

6. Jim Wagner, Clyde Rader, Robert B. Ruegamer, and George A. Kelley testified in opposition to the hook-up charge.

#### COMMISSION ANALYSIS & FINDINGS

##### \$1,000 HOOK-UP FEE

The Montana Supreme Court has clearly stated that as long as the charge made is reasonable and just, the practice of a municipal utility charging a fee to tap into a main for a new customer is lawful. (Leischner v. City of Billings, (35 Mont. 109,115). However, it is also clear that MCA 69-3-201 requires all utilities to file with the Public Service Commission schedules showing all charges in force for any service rendered by the utility.

It is clear that since the City of Hardin has been charging

the \$1,000 hook-up fee thus far without an approved tariff, the fees collected up until now are unlawful and must be refunded.

As for the prospective application of a hook-up fee by the City of Hardin, the Commission concludes that the Leischner case, *supra* requires that such a charge be cost justified. The City of Hardin provided no quantitative analysis to justify the \$1,000 hook-up fee but rather relied upon the general theory that the City taxpayers had a proprietary interest in the water system. The testimony in this case indicates that some portion of the system may have been financed with general obligation bonds sometime in the past. To the extent City taxpayers contributed to the water system, some proprietary interest exists. However, it must be recognized that a new outside City customer is faced with and served by a depreciated plant. To the extent the outside City customer remains on the water system that customer will certainly be faced with rates necessary to finance the replacement of depreciated plant. In that regard, the Public Service Commission has allowed municipal utilities a recurring annual capital improvement account for the purpose of replacing depreciated plant. Under such a prudent accounting and operating practice outside City customers (and all customers) clearly face the legitimate ongoing cost of water service. Finally, the City chose to finance the water system via general obligation bonds rather than revenue bonds, which specifically pay for the plant.

The Commission, therefore, finds that a City must make a comprehensive showing to justify a hook-up fee for outside City customers based upon the proprietary interest theory. The City of Hardin also suggests that, because the water utility has not paid an allocated share of the administrative

cost, there is additional reason for non-residents to "buy-in" to the tax supported system. The Commission finds that argument unpersuasive. The City of Hardin is responsible to include legitimate operating expenses, including a fair allocation of administrative expense! in user rates. The Commission specifically recognizes these legitimate administrative expenses for municipal utilities in Montana. Obviously, that rationale was not a basis for the existing \$1,000 hook-up fee because until this public hearing, the City was not aware of the basic process of including such expenses in user rates. The fact that the City did not properly reflect these expenses in rates is management error. Any new customer (either within or without the City) pays recurring operating expenses on a equal footing with existing customers. There can be no proprietary interest by way of operating expenses. Finally, it is apparent from the testimony that the \$1,000 hook-up fee was in certain instances waived in exchange for right-of-way. This situation simply illustrates the potential for discrimination in the hook-up issue.

#### Hook-up Moratorium

Mr. Dennis Wacker requested water service on August 4, 1980, according to the late filed exhibit of the City of Hardin dated February 4, 1981. Mr. Wacker lives outside the City limits and is located about 3/4 mile from the existing main. The City adopted a new policy on August 19, 1980, establishing a moratorium on new hook-ups due to a limited water supply. (Testimony City Engineer, Mr. Hemmings). There are currently three applications pending for water service outside the City limits (Wacker, Big Horn County, Ileen M. Van Zandt). The record indicates that no outside of City hook-ups have been approved since the moratorium. However,

the City did subsequently annex certain areas by resolution dated November 18, 1980. By such annexation the City has committed itself to provide water service within its expanded service area.

Mr. Wacker and the others who testified are agreeable to the requirement that they install and pay for the required main extensions necessary to serve them. This is consistent with Montana law. Mr. Wacker was also willing to pay the \$1,000 hookup fee, Dr. Van Zandt was willing to pay his fair share but questioned basis of \$1,000 fee, and the other witnesses opposed the hook-up fee. (See Finding 6). Mr. Wacker is not located adjacent to an existing main (but rather is 3/4 miles from the main) and is not located within the water service area of the City.

Therefore, the Case of Polson v. Public Service Commission, 155 Mont. 564, does not apply in this instance.

The testimony indicates that Dr. Van Zandt is located adjacent to an existing main and is within the water service area. The Polson case does apply-under those conditions, and the moratorium is of no effect. The City must hook-up Dr. Van Zandt and anyone else in its service area upon request. (Poison v. Public Service Commission).

Enlargement of a water service area is at the discretion of the City. Fundamental fairness, however,, requires that the City apply that discretion in a manner which is consistent and not unjustly discriminatory. In this regard, the Commission is deeply concerned. The evidence in this case leaves the clear impression that the City has failed this test in at least the following ways:

(1) The outside of City hook-up fee (though not an approved tariff) was in several instances waived in exchange for right-of-way.

(2) The City hooked-up some customers outside the City located further from the main than current applicants who were denied a hook-up because of the moratorium.

(3) The Moratorium on new hook-ups was established August 19, 1980, after Mr. Wacker's application of August 4, and Ileen Van Zandt's Application of August 13, 1980. Retroactive application of the moratorium is certainly questionable.

(4) The City annexed an area after the moratorium was declared, thus extending its water service area and obligation to provide water service.

According to the City, the moratorium was established because of a limited water supply capability. It is, therefore, apparent that if any moratorium was necessary, it should apply without discrimination to all service area enlargements whether by annexation or by main extensions outside the City limits.

Examination of the City Engineer revealed that the City had not considered alternative ways of reducing the peak water consumption periods or annual consumption. To the extent water supply is not adequate to serve all customers either at periods of peak demand, or on a volume basis, the City has a number of potential and equitable remedies available such as: alternate-day sprinkling, limited hour sprinkling, and inverted rate structures.

While main extensions or service area enlargements are

discretionary with the City, the record in this case provides a basis for reexamination of existing City policies and practices as a minimum.

The Public Service Commission does not have jurisdiction over the main extension policy of the City, its application of the outside of City moratorium on hook-ups, and the possible discrimination issues involved in this record. These questions are matters for the courts.

#### CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and subject matter in this Docket.
2. The Commission afforded all persons proper notice and an opportunity to participate in this Docket.
3. Hook-up fees are lawful when just and reasonable and on file with the Commission; the City of Hardin's hook-up fee has not been filed or justified.
4. It is the undeniable duty of a public utility to furnish adequate service within its service area. (Poison v. Public Service Commission, 155 Mont. 464,474).

#### ORDER

THEREFORE, IT IS ORDERED by Hearing Examiner, Thomas J. Schneider, that the City of Hardin discontinue its practice of charging a \$1,000 hook-up fee.

IT IS FURTHER ORDERED that the City of Hardin rebate the



hook-up fee to each customer who paid it and can be located. The City may make the rebates immediately in the full amount or in monthly installments over a six (6) month period commencing July 1, 1981.

IT IS FURTHER ORDERED, that the City of Hardin hook-up all customers within its service area. The City is not required to alter its service area boundaries.

IT IS FURTHER ORDERED, pursuant to ARM 38.2.4802, that this is a proposed order. Any party shall have the opportunity to file exceptions to this initial decision, present briefs and make oral arguments before the entire Commission, provided such exceptions, briefs and requests for oral argument are presented to this Commission within twenty (20) days from the service date of this proposed order.

IT IS FURTHER ORDERED that a full, true and correct copy of this order be sent for with by first class United States mail to the applicant and all other appearances herein.

DONE at Helena, Montana, this 1st day of June, 1981.

Commissioner, Thomas J. Schneider  
Hearing Examiner

ATTEST:

Madeline L. Cottrill  
Commission Secretary

(SEAL)